Supreme Court, U.S.
FILED
APR 23 2003
OFFICE OF THE CLERK

No. 02-1185

IN THE

Supreme Court of the United States

BRADFORD LEE BUTLER, JR.,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

GERALD A. FEFFER
PAUL MOGIN *

WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000

Attorneys for Petitioner Bradford Lee Butler, Jr.

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT IN REPLY	1
1. The Court of Appeals Specifically Said It Had Fully Considered the Issues Raised in Butler's Petition for Rehearing	1
2. There Is a Conflict in the Circuits	2
3. Substituting One Alleged Employer for Another Was a Fundamental Change in the Charge	3
CONCLUSION	4

TABLE OF AUTHORITIES

	Page
Berger v. United States, 295 U.S. 78 (1935)	4
Stirone v. United States, 361 U.S. 212 (1960)	4
United States v. Crawford, No. 01-1144, 2003 WL 343250 (6th Cir. Feb. 12, 2003)	1, 2
United States v. Crossley, 224 F.3d 847 (6th Cir. 2000)	2
United States v. Miller, 471 U.S. 130 (1985)	4
United States v. O'Neill, 463 F. Supp. 1205 (E.D. Pa. 1979)	3
United States v. Ratcliff, 245 F.3d 1246 (11th Cir. 2001)	3
United States v. Zvi, 168 F.3d 49 (2d Cir. 1999) ...	3

REPLY TO BRIEF IN OPPOSITION

1. The Court of Appeals Specifically Said It Had Fully Considered the Issues Raised in Butler's Petition for Rehearing.

The government is mistaken in asserting (Opp. 5) that the Court of Appeals "did not pass upon" Butler's contention, advanced in his petition for rehearing with suggestion for rehearing en banc, that Count 2 of the superseding indictment was time-barred because it substantially amended the original charge, even if it did not broaden it. In denying rehearing, the Court of Appeals specifically stated:

> The panel has further reviewed the petition for rehearing and concluded that *the issues raised in the petition were fully considered upon the original submission and decision of the case.*

A. 27a-28a (emphasis added). That was an express confirmation that the court, which had directed the government to respond to the petition, had indeed considered the two issues that had been raised in the petition, the first of which (addressed in the first twelve and one-half pages of the petition) was whether Count 2 of the superseding indictment materially amended the charge—whether or not it broadened it—and therefore was barred by the statute of limitations. C.A. Pet. For Reh'g 1-13.

Moreover, it cannot be seriously questioned that the Sixth Circuit adheres to the rule that a superseding indictment relates back to the time of the original indictment if it does not materially broaden the charge. The Sixth Circuit has applied that rule in four published opinions. *See* Pet. 6. Just two days after Butler filed his petition for certiorari, the Sixth Circuit referred to the rule yet again, in an unpublished opinion. *See United States v. Crawford*, No. 01-1144, 2003

WL 343250, *8 (6th Cir. Feb. 12, 2003) ("A superseding indictment 'relates back' as long as it does not broaden the charges alleged in the previous indictment.").[1]

2. There is a Conflict in the Circuits.

Eight circuits have held that a superseding indictment relates back to the date of the original indictment if it neither substantially broadens nor substantially amends the original indictment. *See* Pet. 5-6. The Sixth Circuit has repeatedly held that a superseding indictment relates back to the date of the original indictment if it does not materially broaden the charges made in the original indictment. *See id.* 6. The government now seeks to make this conflict disappear by emphasizing that the Sixth Circuit, in common with the eight circuits that have applied a different standard, views fair notice to the defendant as the overarching concern in deciding the reach of the relation-back doctrine. Opp. 7-8. But fair notice is far too vague a concept to render insignificant the divergence in the standards applied by the circuits. It is no accident that in each of the four published opinions in which the Sixth Circuit has applied its unique standard, it has held that the superseding indictment related back. *See* cases cited at Pet. 6. In contrast, courts applying the majority rule have

---

[1] The government takes issue with the Sixth Circuit's rule, which it notes few federal appellate courts subscribe to, that the statute of limitations may be freely raised for the first time on appeal. Opp. 5 n.2. But the division in the circuits on that question, *see United States v. Crossley*, 224 F.3d 847, 858 (6th Cir. 2000) (citing cases), is not a reason to deny certiorari. To the contrary, this case would be an appropriate vehicle for resolving that conflict as well. The question that that conflict concerns, like the question on which Butler has sought certiorari, is a basic and recurring issue of federal criminal procedure.

not infrequently rejected arguments by the government that a superseding indictment related back.[2]

3. Substituting One Alleged Employer for Another Was a Fundamental Change in the Charge.

The government's final argument is that the superseding indictment returned against Butler "did not broaden or amend the original indictment under any reasonable standard." Opp. 9. That argument is wide of the mark for two reasons.

First, if this Court ultimately agreed with Butler that the Court of Appeals had applied the wrong standard, it would ordinarily leave it to the Court of Appeals on remand to apply the correct standard to the facts.

Second, the government's suggestion that the superseding indictment did not materially amend the original indictment is untenable. The government is incorrect in stating that "Count 2 of the original indictment identified . . . the workers whose withheld employment tax was not paid over—the individuals who performed the business duties and functions of NCR . . . ." Opp. 9. There simply is no such identification anywhere in the original version of Count 2. A. 29a. Moreover, it is wholly implausible to suggest that a defendant is given fair notice, that he may face a charge in which one company (Fullfillment Services Corporation) is the alleged employer, by a charge that presupposed that an entirely different company (Data Central) was the employer. The identity of the alleged employer is a critical fact in a charge of nonpayment of employment tax.[3]

---

[2] *See, e.g., United States v. Ratcliff*, 245 F.3d 1246, 1253 (11th Cir. 2001); *United States v. Zvi*, 168 F.3d 49, 54-55 (2d Cir. 1999); *United States v. O'Neill*, 463 F. Supp. 1205, 1207 (E.D. Pa. 1979).

[3] The government is mistaken in assuming (Opp. 10) that proof of the use of a different corporation than the one named in the charge would have been a mere variance. It would have been a sufficiently important

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, certiorari should be granted.

Respectfully submitted,

GERALD A. FEFFER
PAUL MOGIN *

WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000

Attorneys for Petitioner
Bradford Lee Butler, Jr.

* Counsel of Record

April 24, 2003

---

change to constitute a constructive amendment. *See Stirone v. United States*, 361 U.S. 212, 217 (1960). Surely the government would not view an acquittal on a charge of nonpayment of employment tax due with respect to the employees of one company as a bar to later prosecution for nonpayment of employment tax due with respect to the employees of a different company.

United States v. Miller, 471 U.S. 130 (1985), upon which the government relies (Opp. 10), involved the completely different situation of a superseding indictment that simply omitted material that had been included in the original indictment, *without adding anything*. *Berger v. United States*, 295 U.S. 78 (1935), likewise does not support the government's position. In that case, there was no contention that the evidence proved an offense different from the one charged. *See id.* at 81. Instead, the defendant's contention was that "the proof includes more." *Id.* In the hypothetical posed by the government here, the evidence would have proved an offense different from the one charged.